Issue date: 11Jul2002

U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

CASE NO.: 2001-LHC-810

OWCP No.: 08-117442

IN THE MATTER OF

RAYMOND VELES, JR.,

Claimant

v.

COOPER T/SMITH, INCORPORATED,

Employer

and

AMERICAN LONGSHORE MUTUAL ASSOCIATION, LTD.,

Carrier

APPEARANCES:

DENNIS L. BROWN, ESQ.

For the Claimant

ANDREW Z. SCHRECK, ESQ.

For the Employer/Carrier

Patrick M. FLYNN, ESQ.

For the Intervenor

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Raymond Veles (Claimant) against Cooper T/Smith, Inc. (Employer) and American Longshore Mutual Association, LTD. (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing issued scheduling a formal hearing on September 24, 2001, in Houston, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 26 exhibits, Employer/Carrier proffered 13 exhibits and Intervenor offered one exhibit which were admitted into evidence along with one Joint Exhibit. Subsequent to the formal hearing, the parties were allowed to develop additional evidence for an extended period of time. The record was closed on May 16, 2002. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from Claimant and Employer/Carrier on June 24, 2002. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Claimant was injured on November 26, 1999.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

---

[1] References to the transcript and exhibits are as follows: Transcript: Tr.___ ; Claimant's Exhibits: CX-___; Employer/Carrier Exhibits: EX-___; and Joint Exhibit: JX-__.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That the Employer was notified of the accident/injury on November 26, 1999.

5. That Employer/Carrier filed Notices of Controversion on December 27, 1999, March 3, 2000, and October 17, 2000.

6. That an informal conference before the District Director was held on May 16, 2000.

7. That Claimant received temporary total disability benefits for nine weeks from November 27, 1999 through January 28, 2000, at a compensation rate of $297.85 for a total of $2,680.67.

II. ISSUES

The unresolved issues presented by the parties are:

1. The causal relationship of the injury to Claimant's surgery.

2. Entitlement to medical expenses pursuant to Section 7 of the act.

3. Claimant's average weekly wage.

4. Nature and extent of Claimant's injury.

5. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant is a 55 year-old married man and father of two dependent children. He left school after the sixth grade and is unable to read or write. He has been a longshoreman through the International Longshoremen Association, Local No. 24, since 1970. ILA Local 24 is known as the deep sea local which is responsible for unloading and loading ships. (Tr. 51-52).

On November 26, 1999, the day of the accident, Claimant was serving as a walking foreman for Employer, an assignment which

required Claimant to work alongside his men. His crew was loading and securing tanks on a ship, which involved throwing chains over and climbing on top of the cargo. (Tr. 52-55). Claimant asserts he fell when he was helping another worker secure a tank. He testified he landed on his left knee with all his body weight, and the cheater pipe he was working with struck the side of his left knee. (Tr. 53, 69, 94).

The accident occurred around 10:30 p.m. Afterward, Claimant examined himself and observed a large bruise and knot on his left knee, which felt as though it was bleeding. He also had pain on his kneecap and the side of his knee. He reported his injury to the superintendent who reminded Claimant to make a written notation of the injury before leaving work. (Tr. 55, 69).

Claimant did not continue to do actual physical work after the injury, however he did stay and encourage his gang to finish the job already near completion. The job was completed at approximately one o'clock in the morning. (Tr. 56-57). This was the first time Claimant had ever injured, or had any medical problems with, his left knee. After work, Claimant had stinging pain in his knee and it continued to feel as if it were bleeding. (Tr. 56-57).

The following day there was pain and throbbing in Claimant's entire left knee, including his kneecap, and a purple bruise had formed on the front and inside of his knee. He went to his supervisor to ask for, and was granted, permission to see a doctor. (Tr. 57-58).

When Claimant went to his family doctor, Dr. Moers, his knee was very swollen and bruised. (Tr. 58, 95-96). Dr. Moers' records indicate Claimant did not visit his office until December 9, 1999, almost two weeks after his accident. However, Claimant stated he went to Dr. Moers as soon as he received authorization to do so. On cross-examination, he deferred to Dr. Moers' records. (Tr. 94-95). Claimant could not explain why Dr. Moers' and the physical therapist's records only referred to bruising of the side of his knee and did not mention his kneecap. (Tr. 96-97). Nevertheless, Dr. Moers prescribed physical therapy and medication for pain, and took Claimant off of work. Claimant felt the therapy Dr. Moers prescribed made his pain worse. (Tr. 58).

An MRI of Claimant's left knee was performed on January 18, 2000. Dr. Moers, after reviewing the MRI, informed Claimant his knee was damaged and an operation would be necessary. Claimant was referred to Dr. Eidmen. (Tr. 59-60). However, Claimant

testified he was unable to get the doctor's office or his insurance company to approve a visit with Dr. Eidmen. (Tr. 60).

Carrier sent Claimant to see Dr. Pennington. At the January 26, 2000 examination, Claimant alleged Dr. Pennington pressed on his knee and moved it up and down, causing him pain. Dr. Pennington told Claimant his ailment was a symptom of bow-leggedness. Dr. Pennington never discussed with Claimant a release to return to work, and Claimant did not receive the records from the visit. Claimant testified he had to limp out of the office in pain. (Tr. 61-62).

He first received treatment from an orthopedic specialist, Dr. Sanders, on May 18, 2000. Claimant described his condition around May 2000 as "real bad." There was still a lot of swelling and his knee hurt on both the bottom and top, as well as under the kneecap. (Tr. 62-63). Claimant testified it hurt too much to walk and, as a result, he had fallen in his back yard and hurt his knee again. (Tr. 64). After the examination, Dr. Sanders informed Claimant he would need surgery. (Tr. 63). However, Claimant was unable to obtain Carrier's approval for the recommended surgery. (Tr. 64). During this period of time, Claimant was still under the care of his treating physician, Dr. Moers, who had not released Claimant to work. (Tr. 62, 64).

At the request of the Department of Labor, Claimant saw Dr. Butler on July 26, 2000. His knee condition had not improved. This examination was similar to previous ones; Dr. Butler pulled Claimant's leg up and down and moved Claimant's kneecap from side to side, which caused him pain. Dr. Butler opined surgery was needed but disagreed with Dr. Sanders as to the type of surgery which would benefit Claimant. (Tr. 65-66). Claimant indicated he was willing to accept Dr. Butler's opinion and allow him to take over his treatment. Through his previous counsel, Claimant made a request to Carrier to authorize the surgery recommended by Dr. Butler. His request was denied. (Tr. 66).

Finally, Claimant made arrangements with his private insurance company to cover his medical care and costs, and on October 11, 2000, Claimant went to Dr. Bryan, an approved physician on his private insurance company's plan. (Tr. 66-67). After examining Claimant's knee and the January 2000 MRI, Dr. Bryan concluded surgery was necessary. He performed arthroscopic surgery on November 2, 2000. (Tr. 67-68). Claimant testified Dr. Bryan told him that scraping was done under his knee and it would take a long time to heal. However, on cross-examination, Claimant had no explanation for why the operative report stated Dr. Bryan removed fragments of cartilage, but did not scrape

anything. (Tr. 98-99).

The surgery initially helped Claimant. He participated in walking therapy which was too painful, so Dr. Bryan switched him to swimming therapy. (Tr. 69-70). Claimant described his pain in his left knee as almost as bad after surgery as it was before surgery. It hurt specifically under the kneecap, and climbing, walking or standing for a long period of time caused additional pain. After the physical therapy did not work, Dr. Bryan gave Claimant three injections to alleviate the pain, but they were also ineffective. (Tr. 70-71).

Dr. Bryan referred Claimant to Dr. Kolstad for a second opinion. (Tr. 71). According to Claimant, his knee swelling was constant, but fluctuated to different levels at different times. (Tr. 99-100). On cross-examination, Claimant disputed Employer's suggestion that Dr. Kolstad found no swelling in his examination. Further, in contradiction to Claimant's assertions, Dr. Kolstad's notes revealed some testing during the examination caused Claimant no pain. (Tr. 101-102).

Dr. Kolstad referred Claimant to Dr. Calvillo, a pain specialist. At the initial meeting in August 2001, Dr. Calvillo explained he was going to prescribe pain shots, and administered one shot, but did not express the length of the contemplated treatment or any other methods of care. (Tr. 73).

Claimant testified he has developed back pain since his accident and knee injury. (Tr. 74). He asserts it is a result from his limping and switching from crutches to a cane. (Tr. 74, 90). On cross-examination, Claimant testified he limped both before and after his knee surgery, but did not start feeling back pain until he began using a cane, after the surgery. At the beginning, Claimant's back pain affected his sleep and his daily activities. He compared it to pushing on a bruise, and measured it as an 8 on a scale from zero, or no pain, to 10, the worst pain imaginable. (Tr. 90-91). According to Claimant, he promptly notified Dr. Bryan of his back condition when it began. (Tr. 93-94). However, Dr. Bryan's medical records do not mention Claimant's back pain until six months later, in July 2001. (Tr. 92-93).

Dr. Bryan made no attempt to treat Claimant's back injury, but referred him to a back specialist, Dr. Gertzbein. (Tr. 74). Dr. Gertzbein performed an MRI on Claimant's back on September 1, 2001. He informed Claimant about a treatment plan needed to relieve his back pain which involved pain shots and physical therapy. (Tr. 75).

Claimant testified he had a work-related back injury around 1980, which resulted in surgery and kept him out of work for five years. When Claimant initially returned to work, the fusion from his back surgery came apart which required corrective surgery, resulting in a long delay before he was able to return to work. (Tr. 75-77). When he returned to work it was without restriction. (Tr. 84). According to Claimant, he has not seen a doctor nor had any problems with his back since recovering from his previous 1980 injury. (Tr. 76-77). Further, he claims to have never had a previous injury, work-related or otherwise, concerning his left knee. (Tr. 78-79).

No compensation has been paid subsequent to January 28, 2000, when Carrier stopped payments, and Claimant has not been released to work by his current treating physician, Dr. Bryan. Despite his efforts to obtain suitable alternative employment through his union, he has been unable to work or earn wages of any kind. The union informed Claimant any jobs they have would require hard labor. (Tr. 80-81). Claimant has tried to obtain a commercial driver's license, a requirement to be a member of the driver's board at the union, however, he was unable to perform adequately on the written examination. Likewise, Claimant testified he would be unable to adequately handle any job at the union involving reading and writing. (Tr. 84-85).

Claimant does not feel there are any jobs on the waterfront he can physically perform, but in doing work around his home Claimant testified he can stand for 40-45 minutes before pain would require him to sit down. (Tr. 81). He has trouble squatting, lifting and carrying. (Tr. 83). Moreover, three or four times a day Claimant must completely get off his feet and lay down for a period of 30-40 minutes, sometimes on the floor, to help with his back pain. Additionally, Claimant has experienced difficulty sleeping because movement when laying in bed can be painful. (Tr. 82, 90). Some of the day-to-day activities Claimant engages in include showering, dressing, cooking, washing dishes and sweeping. (Tr. 103-104).

Generally, Claimant's knee has been quite bothersome over recent months and has greatly restricted his mobility both in and out doors. (Tr. 82). Claimant attempts his walking exercises everyday, however at times is unable to complete them. No further exercises have been assigned for his knee. (Tr. 105-106).

As a remedy, Claimant seeks reinstatement of his compensation benefits, payment of his unpaid medical bills and reimbursement of all personal expenses incurred as a result of

his work-related injury. (Tr. 85-86).

Raymond Hernandez

Since 1992, Mr. Hernandez has been the personnel director, secretary/treasurer of International Longshoremen's Association, Local No. 24, in which Claimant is a member. (Tr. 31). He has been a longshoreman for 37 years. (Tr. 32). Part of his union duties are to participate in the development of hiring policies. Specifically, the union has instituted a hiring program based initially on seniority, but which incorporates a "core gang" initiative. (Tr. 31-32).

According to Mr. Hernandez, Claimant has a seniority classification of 18 out of 50, but could possibly be eligible to move up to 19 on October 1, 2001, if his seniority documentation is "brought up."[2] (Tr. 32-33). Mr. Hernandez was unsure whether Claimant had worked in the past year. However, he explained if a person doesn't work and accumulate hours they cannot move up in seniority. (Tr. 33).

There are approximately 350 people in the classes of seniority ahead Claimant who would be offered jobs before him. In addition, there are about 40 people who share the same classification as Claimant. Once a class becomes eligible for a job, the foreman chooses personnel from within that class on both a seniority and qualifications basis. The foreman determines what type of work a job will entail, and assigns workers with experience doing that type of work. (Tr. 34-35).

The union has also reorganized the system of core gangs within each class of workers. Before this new system was put in place, workers just lined up to get hired. The workers originally became a part of a core gang board by signing up, but since the number of gangs has not grown, membership is based on both a sign-up and interview process. (Tr. 35-37). To become members of other boards, such as truck driving or fork-lift driving, a worker must receive proper certification. (Tr. 37-38).

Employers hire core gangs and, if needed, will supplement them with regular workers of their choice. As a result, most employers directly hire the core gangs and regular workers, leaving little left over for workers on the union floor. (Tr. 36, 41). Mr. Hernandez testified many of the jobs that may have

---

[2]Currently there are 51 classifications. As of October 1, 2001, the members of the 50 class moved up to the 51 class.

been available to Claimant under the previous hiring system were now not available due to the new core gang system and regular worker supplementation. (Tr. 35-36).

Prior to his injuries, Claimant worked as a walking foreman or securing gang person out of Local No. 24. His duties typically included "securing cargo or lashing cargo." (Tr. 38). As a gang foreman, Claimant was responsible for his own group of workers. As a walking foreman, he was in charge of the ship, the other foreman and their gangs. Both of these positions were working jobs, involving actual labor. (Tr. 39-40).

Mr. Hernandez testified a typical section 18 worker, not working as a foreman or in a core group, would get leftovers from Barber's Cut Terminal, a higher paying terminal, or whatever is available in the turning basin, after the core groups are hired. These jobs are currently very limited. (Tr. 40-41). Specifically, most work available to Claimant as a section 18 class member would require him to climb into the hatches and climb ladders to get in and out of the hold. The union's contract with employers requires all longshoremen to lift 50 pounds, stoop and climb. No job through the union would be classified as sedentary work, because an employer could assign a worker to do any job on the ship as needed on any particular day. (Tr. 41-42, 45). Even the job of a flagman, whose duties typically involve a lower level of physical strain and are currently delegated to the gang foreman, is not sedentary work. (Tr. 43).

According to Mr. Hernandez, Employer is a member of West Gulf Maritime Association. This association reserves the right to dispute testing or retest employees before they return to work after being out due to an injury. The employer's decision to examine a returning employee usually depends on the amount of time the employee has been out of work. (Tr. 46). Any of the employers could interview Claimant upon his return to work to establish whether he was ready and able to perform the job requirements for one of the core gang or board jobs. (Tr. 47).

Mr. Hernandez testified he has observed Claimant limping on a cane and having difficulties navigating stairways. According to Mr. Hernandez, there are no jobs at the union Claimant could perform with his medical problems. (Tr. 47-48).

On cross-examination, Mr. Hernandez testified he was unaware of any work restrictions assigned to Claimant. However, he suggested if Claimant were to obtain his commercial driver's license and be certified after an examination from West Gulf, he would be eligible to apply for a driver's board job that may

require less physically demanding work. His seniority status would be taken into account at that time. (Tr. 48-49).

The Medical Evidence

Robert W. Moers, M.D.

Claimant was first examined by Dr. Moers, his family doctor, on December 9, 1999. Dr. Moers reported Claimant complained of pain, swelling and bruising of his left knee caused by a pipe striking the knee. Claimant did not report falling on his knee as a result of the accident. Dr. Moers recommended physical therapy. (CX-6, p. 1). He took X-rays of Claimant's left knee on December 14, 1999. On January 6, 2000, Claimant reported "shooting pains" in his knee, and felt his knee may lock-up or give out. Dr. Moers also noticed mild crepitus in Claimant's knee. (CX-6, p. 6, 8).

An MRI of Claimant's left knee was performed on January 18, 2000. The MRI showed degenerative changes in the medial meniscus, but no definite tear. There was no evidence of cruciate or collateral ligament damage. However, there was mild to moderate chondromalacia in the medial-femoral condyle, and mild to moderate chondromalacia involving the lateral patellar and apex. (CX-6, pp. 10-11).

Dr. Moers referred Claimant for a functional capacity evaluation on January 19, 2000, performed by Functional Testing Inc. The testing found Claimant cooperative and able to complete all test activities with consistent effort. Claimant's perceptions regarding his ability to function reflected minimal symptom change and/or response to physical activities. (CX-6, p. 13).

Claimant attended numerous follow-up visits on February 8, 2000, March 6, 2000, March 22, 2000, April 19, 2000 and May 16, 2000, complaining of constant pain, weakness and a feeling as if his knee would lock up. In March 2000, Dr. Moers prescribed medication to ease Claimant's pain and swelling. Despite the negative MRI, he believed Claimant tore his meniscus. Dr. Moers referred Claimant to Dr. Sanders, an orthopedic specialist. (CX-6, pp.28-35).

Claimant followed-up with Dr. Moers after an initial visit with Dr. Sanders on June 14, 2000. Dr. Moers noted no change in

Claimant's condition and found positive McMurray's signs, as well as a possible tear in the medial meniscus. He was made aware Dr. Sanders planned to perform surgery on Claimant. (CX-6, p. 36). Additionally, Dr. Moers indicated Claimant had a medial meniscus tear in his left knee and had been totally disabled as of December 14, 1999. (CX-6, p. 37).

On August 11, 2000, Claimant reported to Dr. Moers that he was walking in his back yard when his left knee gave out on him, causing him to fall and land on his left knee. Claimant stated he could hardly walk and his knee was hurting. X-rays were ordered. (CX-6, p. 39). Follow-up visits on August 14 and 21, 2000, revealed Claimant's left knee remained painful and swollen. (CX-6, pp. 41, 43). On August 18, 2000, Dr. Moers stated Claimant was still unable to return to work and it could not be determined if or when he would be able to return to work. (CX-6, p. 42).

Claimant underwent physical therapy at the behest of Dr. Moers, beginning with an initial evaluation on December 14, 1999. During the evaluation, Claimant explained he hurt his knee when a cheater pipe he was using slipped and struck the side of his left knee, and he complained about pain in his left knee with activity. Physical therapy was administered through February 18, 2000. (CX-6a, pp. 1-10).

Jack W. Pennington, M.D.

Claimant was examined by Dr. Pennington on January 26, 2000, at the request of Carrier. (EX-3, p. 1). Claimant informed Dr. Pennington he hurt his knee when a cheater pipe he was using slipped and hit the inside of his left knee. He stated he continued to work until he saw Dr. Moers "four days later." Claimant complained of constant pain over the inside of his knee, swelling, giving way, locking-up and popping of his knee. No other symptoms were reported in his legs or lower back, except for occasional numbness in his left foot when he remained seated for 10-15 minutes. (EX-3, p. 2).

Upon physical examination of Claimant's left knee, Dr. Pennington noted tenderness all over, concentrated medially, but opined Claimant was not in acute distress. There was no swelling or instability, and McMurray's sign was negative. Straight leg raising to 90 degrees in the sitting position was negative and Claimant had a full range of motion. Any contusions on the knee had healed by this time. Dr. Pennington did note Claimant exhibited mild bilateral varus (bow-legged) deformity of both knees. (EX-3, pp. 2-3).

Dr. Pennington also reviewed the January 18, 2000 MRI of

Claimant's left knee. His interpretation of the image was Claimant did not tear his meniscus or knee ligaments, but did suffer from longstanding chondromalacia. (CX-6, p. 26).

As a result of this evaluation, Dr. Pennington concluded Claimant suffered from longstanding bowlegged deformities which developed into chondromalacia of the knee. In his opinion, there was no evidence that Claimant's accident caused a fracture, meniscus tear or ligament tear. No surgery was deemed necessary, however conservative treatment for the chondromalacia was recommended. He further opined Claimant had reached maximum medical improvement, and his work-related injury had healed sufficiently to allow Claimant to return to regular work duties without impairment under AMA guidelines. (EX-3, pp. 3-4).

On September 25, 2000, Dr. Pennington, at Carrier's request, reviewed the conflicting opinions of Dr. Sanders and Dr. Butler. He was unpersuaded by their observations and recommendations, and reiterated his initial findings from the January 26, 2000 examination, including the lack of evidence of an aggravation of the pre-existing chondromalacia and osteoarthritis of the knee or that Claimant needed any surgery. (EX-5).

Mark S. Sanders M.D.

Claimant saw Dr. Sanders, an orthopedic specialist, on May 18, 2000, upon referral from Dr. Moers. Dr. Sanders reported Claimant complained of pain, swelling, weakness and grinding of his knee. His report does not detail the history of Claimant's injury. Claimant had been unresponsive to anti-inflammatories and physical therapy. (CX-7, p. 1).

After a physical examination, Dr. Sanders found a swollen knee, medial joint line tenderness, a positive McMurray's sign and restricted flexion past 110 degrees. Dr. Sanders also noticed Claimant had an antalgic gait, or limp. Although x-rays were normal, he opined the MRI showed an abnormal signal in the posterior horn of the medial meniscus, but he could not determine a tear. Dr. Sanders noted Claimant had not responded to seven months of conservative treatment by Dr. Moers. He concluded a tear existed and recommended arthroscopic surgery for meniscectomy. (CX-7, p.1).

James E. Butler, M.D.

At the request of the Department of Labor, Dr. Butler examined Claimant on July 26, 2000. The purpose of the examination was to obtain a second opinion regarding a need for surgery to repair a possible meniscus tear. (CX-8, p. 1). Dr.

Butler's report indicated the mechanism of Claimant's injury was a work-related fall directly onto his left knee, after which a pipe snapped and struck him on the side of his knee. Dr. Butler notes Claimant "sustained an immediate direct blow-type injury to the left knee." Claimant described his symptoms as feeling as if his knee would give way while walking, anterior knee pain with sitting too long, squatting or climbing, problems standing from a seated or squatting position and continuous dull aching pain. (CX-8, p. 1).

Dr. Butler conducted a physical examination of Claimant's left knee. He reported limited range of motion due to anterior knee pain. The patellofemoral joint was extremely tender, with a moderate degree of crepitus. Dr. Butler also noticed tenderness in the medial femoral condyle. However, he detected no joint line tenderness, limitation of extension, ligamentous instability or swelling in Claimant's knee. He did note mild patellofemoral crepitus in the right knee, which was asymptomatic. (CX-8, pp. 1-2).

Dr. Butler also reviewed the January 18, 2000 MRI of Claimant's knee. He interpreted the impressions to indicate no meniscus tear, which normally results from a weight-bearing twisting motion, and not a direct blow to the knee. This image correlates "perfectly" with Dr. Butler's clinical diagnosis that Claimant's accident (including a fall and a pipe striking Claimant) aggravated his pre-existing patella chondromalacia syndrome, resulting in chondromalacia of the patellofemoral joint and the medial femoral condyle. (CX-8, p. 2).

Dr. Butler indicated surgery was necessary for Claimant. However, he opined the surgery should concentrate on the patellofemoral joint (which might include resurfacing of that joint) and the medial femoral condyle, not a torn meniscus as previously indicated by Dr. Sanders. (CX-8, p. 2).

William J. Bryan, M.D.

Claimant first saw Dr. Bryan on October 11, 2000. Claimant reported to Dr. Bryan he had injured his left knee when a cheater pipe he was working with slipped and hit him on the inside of his left knee. The medical report does not indicate Claimant fell directly onto his knee. (EX-6, pp. 12-13). Upon physical examination, Dr. Bryan observed tenderness over the medial side of Claimant's knee, a positive Lachman's test and no evidence of anterior cruciate insufficiency. X-rays were normal, but review

of the January 18, 2000 MRI of Claimant's left knee showed a suspicious tear in the posterior horn of the medial meniscus. (EX-6, p. 12).

Dr. Bryan concluded Claimant had sustained a twisting injury to his knee, which had caused either a tear in the medial meniscus or chondromalacia in his left knee medial compartment. Dr. Bryan noted Claimant had not responded to conservative care and was limited in his daily activities. He considered Claimant a candidate for arthroscopy. (EX-6, p. 12).

On November 2, 2000, Claimant underwent arthroscopy of the left knee with debridement of the medial femoral condyle and posterior patella. The surgery revealed the anterior cruciate ligament (ACL) was intact and healthy, as was the medial meniscus, which had no tear or trapped debris. Dr. Bryan debrided unstable fragments of articular cartilage from the medial compartment, and from the posterior patellar. He diagnosed Claimant with Grade III medial femoral condyle chondromalacia and Grade II patellar chondromalacia. (EX-6, pp. 10-11).

Claimant had follow-up visits with Dr. Bryan on November 8, 2000 and December 8, 2000. Dr. Bryan noted pain persisted in the left knee, however recovery progressed well and he recommended Claimant participate in physical therapy. (EX-6, pp. 8-9). Dr. Bryan indicated Claimant was not able to return to his normal work activities. (EX-13, pp. 118-119).

On January 10, 2001, Dr. Bryan found Claimant to be making slow progress, as was expected after such surgery, but he attempted to facilitate recovery with a series of Synvisc injections. However, Claimant's insurance ran out by March 7, 2001, and the injection series was not applied. At the March 7, 2001 visit, Dr. Bryan noticed Claimant used a crutch for simple gait. Claimant reported he could not stand on his feet for more than one hour, nor could he stoop, squat or carry objects heavier than twenty pounds. Dr. Bryan opined Claimant was 100% disabled from his usual job activities, but he could perform purely sedentary work. Strengthening exercises were recommended. (EX-6, pp. 6-7).

Claimant participated in physical therapy at Dr. Bryan's request at Texas Orthopedic Hospital. Claimant attended 33 out of 38 scheduled appointments. Initially, improvement was noted by the physical therapist, however overall progress toward goals was eventually deemed unsatisfactory. On April 23, 2001, a new prescription was required before any additional treatment could

be administered. (CX-9, pp. 16-23). On April 25, 2001, Dr. Bryan opined that Claimant remained 100% disabled from any job activities. (CX-9, p. 5).

The Synvisc injection series began on May 23, 2001. Claimant complained the first injection increased the pain in his knee. Dr. Bryan found no evidence of a reaction, but did note Claimant's low tolerance for pain which indicated his knee recovery would be slow. A total of three injections were given, but Claimant reported little, if any progress. Dr. Bryan reassured Claimant his condition seemed moderate, and observed no swelling. (EX-6, pp. 2-5).

On July 11, 2001, Claimant complained to Dr. Bryan of back pain. He referred Claimant to a spine doctor and concluded there was nothing else he could do for Claimant. (EX-6, p. 1).

Dr. Bryan ordered an MRI of Claimant's left knee, which was performed on July 21, 2001. The impressions showed mild osteoarthritis and mild degenerative change in medial meniscus, but no evidence of meniscal tear. There was chondromalacia involving the medial and lateral joint compartments, and a physiological accumulation of fluid within the joint. Furthermore, there were no new signs of abnormality since the previous MRI of January 18, 2000. (EX-7, p. 1).

Kaare Kolstad, M.D.

Dr. Kolstad performed a physical examination of Claimant on September 13, 2001, based on a referral from Dr. Bryan. He reported Claimant was not in acute distress. He found no inflammation or crepitus in the left knee, and McMurray and Lachman tests were negative. Dr. Kolstad noted Claimant's knee pain was focused on the anterior medial to medial area of his knee. He found Claimant to be hypersensitive, as sensory testing of the knee to soft touch created paresthesias and pain which was out of proportion to the touch. (CX-20, p. 1).

Dr. Kolstad concluded from Claimant's history and physical examination that his symptoms are consistent with sympathetic pain syndrome. He referred Claimant to Dr. Calvillo, an anesthesiology pain specialist, for sympathetic ganglion blocks. (EX-13, p. 112).

Octavio Calvillo, M.D., Ph.D.

Dr. Calvillo first examined Claimant on September 19, 2001. Claimant reported he fell and hit his knee, but denied sustaining

damage at that time. Dr. Calvillo noted Claimant's arthroscopic surgery, and Claimant's continuing post-operative pain. Claimant reported his pain at an "8," and claimed it is aggravated by applying light pressure to the knee. Although Claimant complained of persistent and significant swelling of the knee, Dr. Calvillo found no anatomical abnormalities to explain his condition. (EX-13, p. 106).

Dr. Calvillo performed an injection at Claimant's saphenous nerve, which helped the pain for two days, but then wore off. He planned to do a lumbar sympathetic block on October 1, 2001, but noted Claimant recently received a steroid injection in his back. (EX-13, p. 109). On October 30, 2001, Dr. Calvillo gave Claimant a left L4 steroid injection, which helped Claimant improve to an extent. Dr. Calvillo noted in his records this is a repeat procedure to continue the improvement. (CX-23, p. 3).

Dr. Calvillo saw Claimant on November 12, 2001, and Claimant reported his left leg hurt severely. A L4 segmental nerve block was performed, resulting in initial good relief. Dr. Calvillo noted Dr. Gertzbein's plans to operate on Claimant's back. (CX-23, p. 1)

Stanley Gertzbein, M.D.

Dr. Gertzbein testified by deposition on April 30, 2002. He is a board-certified orthopedic surgeon who, for the past fifteen years, has focused his practice on spinal surgery. Dr. Gertzbein was tendered and accepted by the parties as an expert in orthopedic surgery. (CX-21, pp. 5-6).

Dr. Gertzbein first examined Claimant on August 20, 2001, based on a referral from Dr. Bryan. At that visit, Claimant complained of pain in his lower back and numbness and tingling in his left leg. (CX-21, pp. 6-7). Claimant measured his back pain as a six out of ten, which is in the moderate range. (CX-21, p. 37). He stated his symptoms had been present since his November 2000 arthroscopic knee surgery. Claimant also told Dr. Gertzbein he had undergone a spinal fusion in the early 1980s. (CX-21, pp. 6-7).

On cross-examination, Dr. Gertzbein testified he was not aware that Claimant failed to report his present back condition to Dr. Bryan until July 2001. (CX-21, p. 30). However, he stated in some cases it takes a while for trauma to cause major symptoms, and it was possible Claimant started feeling back pain

right after his knee surgery but it did not get bad enough to complain about until six months later. (CX-21, p. 47). He also testified Claimant did not fill-in the medical chart sections pertaining to how his pain began and if he has had neck or back pain before. He accepted Claimant's depiction and history without checking with Dr. Bryan. (CX-21, pp. 36, 38-39). Nonetheless, Dr. Gertzbein stated he felt Claimant was of reasonable intelligence sufficient to properly convey his problems. (CX-21, pp. 33-34). Dr. Gertzbein also stated that while Claimant is intelligent enough to understand the concept of secondary gain, his examination showed no indication Claimant was trying to relate his back injury to his knee injury in order to receive compensation from Employer/Carrier. (CX-21, pp. 33-34). He further noted that Claimant reported his back problems had been ongoing for the last six months. (CX-21, p. 9).

A physical examination indicated to Dr. Gertzbein that Claimant was in some distress. He had difficulty walking on his feet because of his knee pain. Knee and ankle reflexes were absent in both sides, indicating injury to the nerves that run to the ankles. Dr. Gertzbein opined the absent reflex in the left knee was due to the surgery, while the absent reflex in the right knee may have been due to a neurological condition. A straight leg raising test was negative. Dr. Gertzbein concluded from Claimant's history and exam that Claimant was having a nerve root or disk problem. (CX-21, p. 8). X-rays of Claimant's lumbar spine demonstrated the previous fusion at the L5-S1 level, and Dr. Gertzbein opined Claimant's low back problems were most likely at the level just above his fusion, the L4-5 level. He recommended physical therapy. (CX-21, p. 9). After this visit, Dr. Gertzbein concluded Claimant could not perform work at his normal job on the waterfront. (CX-21, p. 11).

Dr. Gertzbein ordered an MRI of Claimant's lumbar spine, which was conducted on September 1, 2001. (CX-22, p. 1). The findings of the MRI showed evidence of the past fusion at the L5-S1 level, with an alignment problem at that same level. A slightly bulging disk, spinal stenosis and degeneration were present at the L4-5 level, with bone spurs at or near the nerve roots. Additionally, there were incidental findings of small herniated disks higher up in the spine not thought to have any bearing on Claimant's low back condition. (CX-21, pp. 9-10).

Dr. Gertzbein recommended epidural steroid injections to reduce the inflammation around the nerves and other tissues present with spinal stenosis. Normally one injection should last for several weeks to several months, but in Claimant it did not

last for more than four or five days. (CX-21, pp. 10-11). Claimant decided not to continue with the injections since the first one was unsuccessful, a decision which Dr. Gertzbein supported due to the risks involved with the injections. (CX-21, pp. 12-13).

At Claimant's November 12, 2001 visit with Dr. Gertzbein, he reported his symptoms had intensified. A physical examination revealed he suffered from acute symptoms in his left leg and moderate back spasm. A straight-leg raising test was positive, indicating inflammation around the nerve root. (CX-21, p. 12). The straight-leg raising test and back spasm were objective findings, and Dr. Gertzbein did not otherwise doubt or question the veracity of Claimant's responses during the exam. (CX-21, p. 13).

On December 3, 2001, Claimant reported his condition was about the same. He was in a lot of pain, suffered from muscle spasm and had little back mobility. Dr. Gertzbein suggested surgery. A diskogram indicated only the level directly above his prior fusion, the L4-5 level, was causing Claimant pain and required surgery. (CX-21, pp. 14-15). Dr. Gertzbein felt Claimant would benefit from decompression surgery, which involved the removal of the bone and bone spurs causing pressure on the nerves, followed by a spinal fusion in which the bones were welded together with bone chips. (CX-21, p. 16).

The surgery was performed on February 28, 2002. Dr. Gertzbein found excessive scar tissue at the pain level, which could have been from Claimant's injury/condition or from the spreading of scar tissue from his old surgery. Dr. Gertzbein was forced to remove a lot of bone and ligament before doing the spinal fusion. He used metal screws and rods to improve the rate of fusion to 95%. This fusion at the L4-5 level connects with the old fusion. (CX-21, pp. 16-17).

Findings such as Claimant's normally take many years to show up, according to Dr. Gertzbein, who believed Claimant's limp and use of a cane subsequent to his knee injury aggravated the underlying conditions in his back, specifically degenerative disk disease and spinal stenosis. He noted Claimant's testimony that he started feeling pain when he began using a cane and limping is consistent with the way Claimant described his pain to Dr. Gertzbein in his medical history. (CX-21, pp. 18-19). Dr. Gertzbein opined these conditions built up over time, and this event was the straw that broke the camel's back and establishes a temporal relationship between the onset of his back symptoms and the start of his limping. (CX-21, p. 18). He testified limping

and favoring one leg puts stress on the lower back, and he has seen many patients develop back problems after using crutches for a long period of time. (CX-21, pp. 19-20).

On cross-examination, Dr. Gertzbein stated to his knowledge Claimant's November 1999 accident had not caused any trauma to his back. He testified his diagnoses were degenerative in nature, the result of an arthritic process and stress from the old fusion. (CX-21, pp. 28-29). He further testified that in light of these degenerative conditions, daily activities could possibly have caused Claimant's pain. However, he also stated daily activities are not as likely to aggravate the condition as limping, because limping is a long-term repetitive trauma to the tissues, not the equivalent of bending over and snapping the tissues. (CX-21, p. 36).

Claimant did well after the back surgery. On April 1, 2002, Dr. Gertzbein noticed he was experiencing post-surgical trauma syndrome in the form of panic attacks, and recommended Claimant see a psychiatrist. Claimant also reported pain in his right leg in early April 2002, but a CAT scan was negative and Dr. Gertzbein opined the leg irritation was due to Claimant's increase in activities. (CX-21, pp. 21-22). At his visit the week of April 30, 2002, Claimant reported continuing post-surgical pain, but his healing was progressing well. (CX-21, p. 23).

As of this last visit, Claimant had not been released to his job, and Dr. Gertzbein testified he cannot return to any type of work. He opined Claimant will reach MMI 6-9 months after the surgery, but he will suffer permanent impairment as a result of his back injury and surgery, as well as his persistent knee injury. It is unlikely Claimant will be able to return to his former job. (CX-21, pp. 24-25, 26). Dr. Gertzbein testified it is too early to tell exactly what Claimant's impairment will be, but he anticipates placing Claimant on limitations for stooping, bending and squatting, and at least six months of intensive physical therapy. He also would recommend vocational rehabilitation services. (CX-21, pp. 25-27). He opined that the treatment he rendered for Claimant since August 2000 was reasonable and necessary as a result of back problems Claimant developed from limping after his knee surgery. (CX-21, p. 27).

However, Dr. Gertzbein testified on cross-examination he does not normally perform employment-related physicals and has no expertise in determining which type of work patients may be released to perform. He also stated if a similar person, with similar pre-existing conditions as Claimant's, had come to him

for treatment, he would not have released that person to perform heavy manual labor. He maintained his opinions with respect to Claimant's physical conditions, need for surgery and restrictions would be the same regardless of what caused the onset of the symptomology in his back. He has yet to assign any specific restrictions to Claimant. (CX-21, pp. 35, 45).

Donald E. Hauser, M.D.

Dr. Hauser, a psychiatrist, evaluated Claimant on April 18, 2002, and diagnosed him with panic disorder. He placed Claimant on Paxil and Xanax, and will continue to evaluate him. (CX-26, p. 1).

Robert A. Fulford, M.D.

Dr. Fulford testified by deposition on April 30, 2002. He is an orthopedic surgeon, board-certified in the State of Texas. Dr. Fulford was tendered and accepted as an expert in orthopedic surgery. (EX-13, pp. 5, 7).

On December 11, 2001, Dr. Fulford performed a medical examination of Claimant at the request of Employer/Carrier. (EX-13, p. 35). He was provided with and reviewed Claimant's medical history, specifically the reports of Drs. Moers, Sanders, Pennington, Butler, Bryan, Gertzbein, Kolstad, and Calvillo, as well as the physical therapy reports and MRI images from January 2000 and July 2001. Dr. Fulford was also asked to perform a physical examination of Claimant's knee, but deferred to Dr. Gertzbein for any comments about Claimant's spine. (EX-13, pp. 8-9, 25).

Upon studying the doctors' reports and MRI images, Dr. Fulford concluded Claimant suffered from chondromalacia, a softening of bone and cartilage, on his kneecap and the inside medial and outside lateral portions of his femur bone. This is a progressive, degenerative disease, and Dr. Fulford opined it was present at the time of his November 26, 1999 injury. (EX-13, pp. 11-12). This was demonstrated by the fact that MRIs taken of Claimant's left knee on January 18, 2000, showed evidence of chondromalacia in three compartments of the knee, a condition which takes many years to develop. Dr. Fulford testified it is almost a medical certainty that such chondromalacia could not have resulted from Claimant's accident just two months earlier. (EX-13, pp. 14-15). Although Dr. Fulford testified the cheater pipe hitting the inside of Claimant's left knee could not <u>cause</u>

chondromalacia of the kneecap, he further testified Claimant's accident could have aggravated the pre-existing chondromalacia and made it symptomatic. (EX-13, p. 14).

Dr. Fulford testified Claimant reported pain in the anterior, or front, section of his left knee. However, Claimant only told him a cheater pipe struck the side of his left knee, not that he fell on his left knee. Dr. Fulford stated striking the medial side of his knee would not have aggravated Claimant's chondromalacia, or otherwise caused him anterior knee pain. (EX-13, pp. 40-42, 65). Even if Claimant had told him he fell on the front of his knee, Dr. Fulford testified he probably fell on the front part of his leg, not necessarily the kneecap itself, because normally a person bends his knee when he falls. Claimant would have had to fall straight on his face to land on his kneecap. However, Dr. Fulford testified if Claimant's leg twisted inward during the fall, he could have hit both the medial side of the knee and the kneecap. If Claimant did fall and hit his kneecap, the accident would have aggravated the patellofemoral chondromalacia. (EX-13, pp. 42, 64).

Dr. Fulford also stated it is easy to miss signs of bow-leggedness unless you are specifically looking for them. He noted Dr. Pennington observed bow-leggedness in Claimant, and stated such a condition may be present, despite the fact he and the other doctors did not notice it. (EX-13, p. 61). Dr. Fulford testified bow-legged individuals are much more susceptible to chondromalacia in the knee because weight-bearing forces are concentrated on the inside part of the knee, causing that area to wear out quicker than the outside of the knee. (EX-13, pp. 61-62). However, on cross-examination he opined chondromalacia develops evenly in each knee, absent any trauma, and noted the only historical difference between Claimant's knees was the trauma he suffered to his left knee in November 1999. This suggests that Claimant's right knee would be symptomatic if Claimant's pain were a result of being bow-legged. There has been no diagnostic study of Claimant's right knee. (EX-13, pp. 60, 62, 78).

Dr. Fulford noted that before the arthroscopic surgery Claimant had trouble bearing weight, straightening his knee and felt his knee would give way. Dr. Fulford opined the chondromalacia caused Claimant's pain. He further noted Dr. Sanders reported Claimant had a painful limp, or antalgic gait, on May 18, 2000, five months before the surgery took place. Dr. Fulford stated the surgery followed proper conservative treatment by Dr. Bryan, medications and physical therapy, and was a last resort in Claimant's course of treatment. (EX-13, pp. 15-17).

Dr. Fulford testified on cross-examination the unstable fragments of articular cartilage found by Dr. Bryan during the surgery can be trauma-related. The arthroscopic surgery pictures also depict traumatic chondromalacia, but Dr. Fulford stated this "trauma" could have been anything from jumping out of a plane to picking cotton. He testified it is present in 30% of people at age 30, and doctors do not know any more about its causes other than it is the result of aging. (EX-13, pp. 52, 58). Dr. Fulford also noted the operative report indicated Claimant had mild inflammation and irritation of the knee joint. (EX-13, p. 48).

During the physical examination, Claimant complained of pain and instability in his left knee and had difficulty walking as well as bending and straightening the knee. He reported these problems caused him to limp, which in turn caused him back pains which were worse with movement and better with rest. (EX-13, p. 18). Dr. Fulford noted Claimant could not fully bend his knee, but there was no water on the knee or inflammation. Claimant's knee and ankle reflexes were symmetrical, and he had generally good sensation in his legs. He reported Claimant was hypersensitive. A Lachman test was negative, indicating no laxity of the cruciate ligaments. Claimant guarded his knee from Dr. Fulford, and would not let him perform a McMurray test to look for a torn medial or lateral meniscus.[3] (EX-13, p. 20). Significantly, a straight-leg raise test was positive when Claimant was laying down, but negative when Claimant was sitting up, a check for nerve impingement in the lower back. Claimant's results conflicted; the findings should be the same in both positions. (EX-13, pp. 26-27). Claimant also had a positive Hoover's sign - when laying down and lifting up one leg, no downward pressure was placed on the other leg. (EX-13, p. 21).

Dr. Fulford testified Claimant's subjective complaints did not match the objective findings. He found nothing to suggest physical problems with Claimant's left knee. Specifically, hypersensitivity and muscle guarding are consistent with symptom magnification. (EX-13, pp. 22-23). Both the inconsistent straight-leg raising tests and positive Hoover's sign indicate less than full voluntary effort by the Claimant. (EX-13, p. 27). Dr. Fulford found Claimant to have full range of motion in his left knee and zero impairment. He opined Claimant was at MMI as of December 11, 2001, and would not have restricted his activities. (EX-13, p. 24).

---

[3] Muscle guarding occurs when a patient resists, protects or withdraws his extremity from examination out of pain. (EX-13, p. 77).

However, on cross-examination Dr. Fulford noted Dr. Kolstad reported Claimant had hypersensitivity on September 13, 2001, and Dr. Bryan had also reported Claimant's low pain threshold. Dr. Fulford acknowledged that these conditions can become more evident after arthroscopic surgery than before. (EX-13, pp. 67-68).

Dr. Fulford testified while Claimant's injury could have made his chondromalacia worse, such a determination is subjective and must rely on Claimant's statements about his pain. (EX-13, p. 33). Claimant's muscle guarding, excessive pain and inconsistent test results caused Dr. Fulford to view his subjective complaints more warily. Nothing objectively indicates Claimant's accident aggravated his chondromalacia. (EX-13, p. 34).

However, on further cross-examination, Dr. Fulford testified he agreed with Dr. Butler's diagnosis that Claimant's accident aggravated the underlying chondromalacia, and stated a blow to the knee "quite possibly" could aggravate pre-existing chondromalacia. (EX-13, pp. 44-45, 59). He also testified crepitus and muscle guarding are objective factors of chondromalacia that turn up in a physical examination. (EX-13, pp. 67-68). He did not find Claimant having any varus deformity of the knees as identified by Dr. Pennington. (EX-13, pp. 60-62).

Dr. Fulford deferred to Dr. Gertzbein for comments about Claimant's back, but he testified it is within his expertise to opine about disease processes associated with spinal surgery. (EX-13, pp. 25, 28). He opined Dr. Gertzbein's findings of adhesions, stenosis and possible disk bulging were consistent with the degenerative process that would result from stress from the L5-S1 fusion completed fifteen years ago. Dr. Fulford testified he has seen many people who limp, but do not have back pains, and therefore he could not say if the limp caused Claimant's back pain. (EX-13, pp. 30, 32). However, in considering Claimant's arthritis, stenosis and degeneration in his back, along with his past spinal fusion and many years as a dock-worker without experiencing any pains, Dr. Fulford did not deny the limp could have been the source of causation. (EX-13, pp. 73-74). It is not unusual for stress to be placed on the joint above a spinal fusion, but in his opinion "anything could" aggravate Claimant's preexisting back conditions. (EX-13, p. 74).

The Contentions of the Parties

Claimant argues on November 26, 1999, he had an accident at work in which he fell onto his left knee, and then was struck on that knee by a cheater pipe. Claimant contends this accident aggravated a condition of pre-existing chondromalacia in his left knee. The injury was immediately and properly reported to employer. Due to his injury, Claimant is unable to return to work and his treating physicians have not released him to work. He contends his arthroscopic knee surgery was necessary and reasonable, and resulted in his limp which, in turn, aggravated a pre-existing condition in his back. Claimant asserts his back problems and his subsequent psychiatric problems are causally related to his work-related knee injury. He requests permanent total disability benefits, including payment of all relevant medical care and expenses, reinstatement of his compensation payments, attorney's fees, penalties and interest. According to Claimant, his average weekly wage is $501.96. He reached MMI for his knee by December 14, 2001, but has yet to reach MMI for his back condition, and no suitable alternative employment has been adequately demonstrated by Employer. (Tr. 20-27).

Employer/Carrier contend although Claimant was struck on the inside of his knee by a cheater pipe, the nature of such accident could not have aggravated Claimant's pre-existing patellofemoral chondromalacia. (Tr. 27-29). They contend the knee contusions Claimant sustained in the accident had resolved themselves by January 26, 2000, and Claimant has been able to work since that date. Employer/Carrier further contend Claimant's back pain is a result of a degenerative disease which was aggravated by his prior spinal fusion, not by his limp which resulted from his knee injury. They argue Claimant has failed to establish a **prima facie** case that he suffers from a permanent injury related to his work accident, and he has no disability because he has not shown an economic loss or physical or psychological impairment from the accident.

Intervenor contends that Claimant entered into an "Agreement" with his union's welfare fund to reimburse the fund an amount equal to the amount of welfare benefits he received if he received any proceeds as a result of his claim for work injuries. Medical expenses in the amount of $4,132.82 have been disbursed on behalf of Claimant during the period from October 11, 2000 through March 6, 2001. (Tr. 12-13). However, further development of additional disbursements was allowed to be conducted during post-hearing efforts.

IV. DISCUSSION

It has been consistently held that the Act must be construed

liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Claimant's Credibility

An administrative law judge has the discretion to determine the credibility of witnesses. Furthermore, an administrative law judge may accept a claimant's testimony as credible, despite inconsistencies, if the record provides substantial evidence of the claimant's injury. Kubin v. Pro-Football, Inc., 29 BRBS 117, 120 (1995); see also Plaquemines Equipment & Machine Co. v. Newman, 460 F.2d 1241, 1243 (5th Cir. 1972).

Employer/Carrier repeatedly attack Claimant's credibility in this matter. Specifically, they contend he did not immediately report his fall during his work-related accident, nor did he immediately report his back injuries. Employer/Carrier also emphasize multiple doctors reported Claimant suffered from hypersensitivity, sympathetic pain syndrome and symptom magnification, which Employer/Carrier claim diminish the veracity his complaints and testimony.

Claimant suffered an accident on November 26, 1999, and immediately reported it to his supervisors. At the hearing, he testified he immediately went to see Dr. Moers, his family doctor. However, I note he did not see Dr. Moers until December 9, 1999, two weeks after the accident. Claimant stated he could

not remember the dates and he deferred to the records on this matter. Similarly, Claimant asserts his back pains started immediately after his knee surgery on November 2, 2000, and he promptly notified Dr. Bryan of such pain. However, such complaints do not show up in Dr. Bryan's reports until July 11, 2001. Dr. Gertzbein opined Claimant's back pain may have started mildly and increased over time to a point where Claimant decided to report it, but Claimant testified at trial his back pains were almost more than he could bear from the beginning. Dr. Gertzbein's notes of his first visit with Claimant in August 2001 reflect Claimant complained he had back pains for the past six months.

Notwithstanding a lack of uniformity in Claimant's recollection of when he visited his family doctor, the foregoing establishes that he did seek medical treatment for his knee problems and did characterize his back pains to Dr. Gertzbein as ongoing for a six month period. I am not persuaded that these variations warrant a conclusion that Claimant is totally lacking in credibility. I so find.

Claimant testified at the hearing in September 2001 that he fell directly onto his left knee, as he also stated in a recorded statement on August 31, 2001. (EX-12, p. 2). However, in Employer's accident reports and Department of Labor forms, the accident is described as a pipe hitting Claimant's left knee causing swelling, bruising and pain. There is no indication Claimant fell onto his left knee. While Employer may have tried to downplay Claimant's accident by not fully reporting it, I note that the reports of Dr. Moers, Dr. Pennington, Dr. Sanders and Dr. Bryan also do not include the fall as part of Claimant's medical history. When asked why these medical reports did not mention anything about his fall onto his knee, Claimant had no other explanation except he told the doctors exactly what he told the Court, and he did not know how they wrote it down. Employer/Carrier assert this change in Claimant's story is evidence he did not fall, and is an attempt to recoup compensation for his pre-existing knee condition.

I note Dr. Gertzbein testified that while Claimant is intelligent enough to understand the concept of secondary gain, there was no evidence Claimant was trying to relate his back injury to his knee injury just to receive compensation. Additionally, none of Claimant's treating physicians had reason to discredit his complaints, although Dr. Kolstad and Dr. Calvillo noted signs of hypersensitivity, symptom magnification and sympathetic pain syndrome after his knee surgery. These opinions may affect Claimant's credibility at the time of trial,

but due to their timing they do not weigh heavily in determining the veracity of Claimant's original complaints one to two years earlier.

Employer/Carrier also point out many discrepancies between the medical reports and Claimant's injury complaints. Dr. Bryan's knee surgery report indicates no scraping was done, yet Claimant testified Dr. Bryan told him he scraped right under his knee. Claimant also testified he has had constant swelling in his knee since the accident, yet Dr. Bryan's report from July 2001 indicated no swelling present, nor did Dr. Kolstad's report from August 2001. Dr. Kolstad reported the physical examination did not produce pain in Claimant, but Claimant testified he experienced pain at this examination. Claimant stated shooting pains started right after the accident, yet Dr. Moers did not note them until January 2000. When questioned as to these discrepancies in his testimony and the doctors' reports, Claimant had no explanation other than he told the doctors everything and did not know what they wrote down.

In view of the foregoing, I conclude that Claimant was not an accurate history-giver, however I do not find his inaccuracies and inconsistencies to be intentionally deceitful. He impressed me at the hearing as straight forward in his testimony and demeanor. He attempted to provide accurate accounts in a truthful and detailed manner, but was not precise with dates, which he readily admitted and deferred to the dates set forth in medical reports and other documentary evidence. I also found his testimony to be generally unequivocal and credible throughout the formal hearing.

However, I find that Claimant provided inconsistent medical histories to various treating and consulting physicians initially. Thus, it is clear he did not mention a fall onto his knee during the work accident to any physician until he was examined by Dr. Butler, eight months after the accident. His explanation that he related the fall and did not know how the provider transcribed his story is not persuasive. However, given the medical opinions of record, I find this inconsistency to be insignificant. Dr. Bryan recommended knee surgery because of an aggravation of Claimant's chondromalacia of the left knee which he attributed to Claimant's version of his work accident (that did not include a fall onto his knee).

Moreover, Dr. Butler opined that Claimant's aggravated chondromalacia condition was caused <u>in part</u> by a cheater pipe striking his left knee. Dr. Fulford's opinion also supports a conclusion that Claimant's accident (being hit with a cheater

pipe) could have aggravated his pre-existing chondromalacia condition. Therefore, I find Claimant's testimony to be buttressed by credible, objective and well-reasoned medical opinions. Claimant's complaints have a medical basis and are substantially supported.

Finally, I am not impressed with or persuaded by Employer/Carrier's attempt to scrutinize the record for trivial instances of Claimant's inconsistencies, none of which undermine the cogent and probative medical opinions of record, further analyzed below, that form the basis of a determination that Claimant suffered a compensable knee injury with debilitating residuals effects.

B. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary- that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

1. Claimant's Prima Facie Case

The parties originally stipulated Claimant's accident and

injury occurred in the course and scope of employment while an employer/employee relationship existed between the parties. After reading the post-hearing evidence, it appears the parties dispute the details of the accident itself. Claimant asserts he fell directly onto his knee, after which a cheater pipe struck the inside of his knee. He argues the fall and blow to his knee aggravated his pre-existing patellofemoral and medial femoral condyle chondromalacia, which in turn aggravated a pre-existing degenerative back condition.

Employer/Carrier point out the discrepancy in Claimant's version of the facts, specifically that his injury reports and doctors' records do not indicate he fell onto his knee until Dr. Butler's report, eight months after the accident occurred. They do not dispute that a cheater pipe hit the inside of Claimant's knee, but they maintain the resulting contusions have healed and the blow did not aggravate a pre-existing condition in Claimant's patellofemoral joint. They further contend Claimant's knee injury and subsequent limping did not aggravate his back condition.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

In the present matter, Claimant complained of pain in the inside and front sections of his left knee as a result of his work-related accident on November 26, 1999. He immediately reported the accident and sought medical treatment, which indicated he had a symptomatic degenerative disease in his left knee. His right knee was diagnosed with the same condition, but was asymptomatic. Dr. Bryan opined Claimant's accident either tore his meniscus or aggravated his medial femoral condyle chondromalacia. Although Claimant did not relate the fall onto his knee to any physician until he saw Dr. Butler, the doctor opined his fall and collision with the pipe aggravated his pre-existing chondromalacia in his patellofemoral joint and medial femoral condyle. Dr. Fulford, Employer/Carrier's doctor, agreed with this diagnosis and conclusion of causation. The doctors reached this diagnosis through an analysis of the objective findings on the MRI tests and Claimant's subjective complaints. None of Claimant's treating physicians found reasons to discount his credibility.

Claimant further contends his knee injury and surgery caused

him to limp, which aggravated a pre-existing condition in his back. Dr. Gertzbein testified Claimant's earlier spinal fusion had placed stress on his L4-5 level, which had built up over time. While he acknowledged that simple daily activities could have aggravated such a condition, he emphasized that limping is long-term, repetitive trauma to the tissues which often results in back pains. He opined Claimant's limping was "the straw that broke the camel's back," thereby causing his back symptomatology.

Thus, Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain to his knee on November 26, 1999, as a result of his work accident, which resulted in surgery and an altered gait that could have caused him pain in his back as well. He established that his activities on that date could have directly resulted in knee harm or pain that required surgery which produced residuals that indirectly resulted in harm or pain to his back sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

2. Employer/Carrier's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have cause them.

The burden shifts to the Employer/Carrier to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998).

Employer/Carrier must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, as here, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra, 377 F.2d at 147-148.

In the present matter, Employer/Carrier presented the medical testimony of Dr. Fulford, who stated if Claimant did not fall onto his knee he could not have aggravated his patellofemoral chondromalacia. Employer/Carrier also presented the opinion of Dr. Pennington, who, after examining Claimant in January 2000, concluded Claimant's chondromalacia was purely the result of being bow-legged and the only accident-related injury, the contusion on his left knee, had healed itself. After reviewing the medical records of Dr. Sanders and Dr. Butler in August 2000, Dr. Pennington maintained his opinion.

Employer/Carrier's orthopedic expert, Dr. Fulford, deferred to Dr. Gertzbein for comments on Claimant's back. He testified he knew many people with a limp who have not developed back problems. However, when he took into consideration Claimant's specific medical history and pre-existing back conditions, he testified anything could have aggravated them, including limping. Thus, he did not contradict Dr. Gertzbein's assertion that Claimant's limping caused his back to become symptomatic.

Thus, with regard to Claimant's knee injury, Employer/Carrier have rebutted Claimant's **prima facie** claim. However, they have failed to rebut the **prima facie** claim that Claimant's accident resulted in a limp, which in turn caused his back injury.

3. The Weighing of the Evidence

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole.

Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

a. Claimant's Knee Injury

Claimant testified he fell onto his left knee while at work, after which a cheater pipe hit him in the side of the same knee. It is his position this accident aggravated the chondromalacia in both the front and inside compartments of his left knee. Employer's accident reports and worker's compensation forms do not indicate Claimant fell onto his knee. I note Claimant only told Dr. Butler and Dr. Calvillo about his fall. The reports of his treating physicians, Dr. Moers and Dr. Bryan, and three consulting orthopedic physicians, Dr. Sanders, Dr. Pennington and Dr. Fulford, do not include the fall as part of Claimant's medical history.

Dr. Pennington examined Claimant on January 26, 2000. After reviewing the MRI of Claimant's knee and conducting a physical examination, he concluded Claimant's chondromalacia was the result of his bow-legged deformities. Dr. Pennington did not have knowledge of the fall when he examined and diagnosed Claimant, but even after reviewing Dr. Butler's report, which evidenced Claimant's fall, he did not change his opinion. Therefore, I find Claimant's inconsistent medical history here is insignificant, as it did not affect Dr. Pennington's diagnosis. Moreover, Dr. Fulford explained bow-legged deformities place weight-bearing pressure onto the inside of both knees, causing them to deteriorate at a quicker rate than other joints, but opined the deterioration would occur at an equal rate in each knee, absent any trauma. He noted, as do I, the only difference between the history of Claimant's knees was the trauma sustained by the left knee. Dr. Fulford, however, disagreed with Dr. Pennington's diagnosis of "bow-leggedness."

Dr. Butler, who had knowledge of Claimant's fall, opined the accident aggravated Claimant's pre-existing patellofemoral and medial femoral condyle chondromalacia. His diagnosis was consistent with the MRI of Claimant's knee. Dr. Bryan, who did not know of Claimant's fall, opined Claimant suffered some type of twisting injury to his knee, which resulted in either a meniscus tear or chondromalacia of the medial femoral condyle and was consistent with Dr. Butler's report. Dr. Bryan did not notice Claimant's patellofemoral chondromalacia until he conducted the arthroscopic surgery, at which point he removed debris from the posterior patellar. He did not opine whether Claimant's injury aggravated the patellofemoral chondromalacia.

I note Employer/Carrier selected Dr. Pennington to examine Claimant on one occasion and his diagnosis was discredited by Dr. Fulford's opinion, although Dr. Pennington maintained his opinion Claimant did not need surgery in light of the opinions of Dr. Sanders and Dr. Butler. However, I note with significance that Dr. Butler was an independent medical examiner appointed by the Department of Labor to examine Claimant. Also, Dr. Bryan was Claimant's treating physician who examined him on numerous occasions between October 2000 and July 2001, as opposed to Dr. Pennington's single visit arranged by Employer/Carrier. While Dr. Sanders' report is helpful in establishing Claimant needed some type of knee surgery, I do not rely heavily on it because he did not render an opinion as to the causation of Claimant's injury. Accordingly, I place more probative value and weight on the records and reports of Dr. Butler and Dr. Bryan, than those of Dr. Pennington.

In analyzing Claimant's conflicting medical histories, the discrepancy has little material effect on the causation of his injuries. I note Dr. Moers and Dr. Sanders did not have knowledge of Claimant's fall, and they did not provide an opinion on causation of Claimant's injuries. These doctors did not attempt to relate the accident to the injury. Additionally, knowledge of Claimant's fall did not alter Dr. Pennington's original diagnosis. Dr. Bryan opined Claimant suffered a twisting injury to his knee, not just a blow to his knee. Therefore, I find Claimant's inconsistent medical history to be immaterial as it did not weigh greatly on the opinions of physicians who determined causation of Claimant's knee injury.

Employer/Carrier arranged for Dr. Fulford to examine Claimant on one occasion, on December 11, 2001. He recognized signs of symptom magnification in Claimant, including hypersensitivity, inconsistent straight leg-raising tests and muscle guarding of the knee. Dr. Fulford stated to link the chondromalacia to the accident, one would have to rely on Claimant's subjective complaints, which were questionable in light of his physical examination findings. However, I note this examination took place more than one year after Claimant's arthroscopic surgery. Dr. Fulford admitted such symptoms could be magnified after surgery, and, moreover, it is reasonable for one to think Claimant's knee would be significantly better after such surgery. Indeed, Claimant conceded in his post-hearing brief that his knee had reached MMI by November 12, 2001. I therefore find the opinions of Dr. Fulford to be unpersuasive. I am not persuaded by a determination of causation of an injury based solely on a physical examination which took place more than

two years after the accident and one year after surgery.

However, Dr. Fulford reviewed past medical records of Dr. Moers, Dr. Sanders, Dr. Butler and Dr. Bryan, and his opinions about such records are helpful in determining the cause of Claimant's chondromalacia. Specifically, Dr. Fulford acknowledged Dr. Sanders' report made no reference to Claimant muscle guarding his knee or suffering from hypersensitivity. Further, when presented with Dr. Butler's report, Dr. Fulford agreed with his diagnosis that Claimant's fall aggravated his chondromalacia. He also stated it is unlikely Claimant fell directly on his kneecap, unless he fell straight on his face. However, he stated Claimant's knee might have twisted in, causing him to land on his medial side of the knee and the kneecap, thus aggravating his chondromalacia. Therefore, I find the reports of Dr. Butler, Dr. Bryan and Dr. Fulford establish a causal connection between Claimant's accident and the chondromalacia in his patellofemoral joint and medial femoral condyle.

b. Claimant's Back Injury

Claimant contends his back began to hurt immediately after his knee surgery. He testified he told Dr. Bryan promptly of his pain, who then gave him medication and injections to relieve his limping. When that did not work he referred Claimant to a spine doctor. Claimant testified Dr. Bryan opined the back pain was a result of his limp. Dr. Bryan's records show Claimant did not mention his back pain until July 2001, at which time he referred him to Dr. Gertzbein.

When Dr. Gertzbein first examined Claimant, he prescribed physical therapy and steroid injections to reduce the pain and inflammation in Claimant's back. He saw Claimant on a regular basis, and eventually suggested surgery. A diskogram showed the L4-5 level which produced the most pain was also the level directly above his previous spinal fusion. During surgery he had to remove a significant amount of scar tissue before operating on the L4-5 level.

Dr. Gertzbein acknowledged that the previous fusion had placed a lot of stress on the L4-5 level, which built up over time. He testified any daily activity could have caused Claimant's back to become symptomatic. Nonetheless, Dr. Gertzbein asserted Claimant's limp aggravated his back condition as it is repetitive long-term trauma on the tissues, much different than bending and snapping the tissues. He testified he has had many patients with limps who subsequently develop back problems, and concluded this was the cause of Claimant's back

problem. As Dr. Fulford only examined Claimant on one occasion at the behest of Employer/Carrier, and deferred to the opinions of Dr. Gertzbein regarding Claimant's back condition, I afford more weight to the opinion of his treating physician, Dr. Gertzbein, who examined Claimant on multiple occasions over the course of eight months and continuing.

Employer/Carrier arranged for Dr. Fulford to examine Claimant's knee injury, however he did testify as to the causation factors of Claimant's back injury. On direct examination, Dr. Fulford testified he has seen many people with limps who never develop back problems. He also noted with significance Claimant's previous fusion, which had placed great pressure on the L4-5 level in his back. This was consistent with the degenerative nature of Claimant's back problems. However, on cross-examination, Dr. Fulford acknowledged the fact Claimant had worked many years after his first fusion without experiencing any pain. When he considered this, along with Claimant's arthritis, stenosis, and degeneration in his back, he stated anything could have caused Claimant's back to become symptomatic. Dr. Fulford did not deny nor dispute Dr. Gertzbein's opinion that Claimant's limp aggravated his back injury. As such, Employer/Carrier have failed to rebut the Section 20(a) presumption that Claimant's back injury is a result of his work-related knee injury and subsequent limp.

4. Conclusion

In conclusion, I find Claimant suffered a compensable work-related knee injury on November 26, 1999. The reports of Dr. Butler and Dr. Bryan indicate the work accident aggravated Claimant's underlying chondromalacia, a diagnosis which was supported by Employer/Carrier's doctor, Dr. Fulford. I find Dr. Pennington's diagnosis unreliable as it was commissioned by Employer/Carrier, discredited by Dr. Fulford and illogical in that it did not explain why Claimant's right knee remained asymptomatic. I also find the discrepancy in medical histories immaterial as to the causation of Claimant's injury. Accordingly, I conclude Claimant's aggravated knee chondromalacia is compensable.

I further conclude Claimant's back injury is a result of his compensable knee injury, surgery and subsequent limp, in accordance with the opinions of Dr. Gertzbein and Dr. Fulford. Thus, Claimant's back injury is compensable since Employer/Carrier failed to rebut the Section 20(a) presumption.

B. Nature and Extent of Disability

The record establishes and I find that Claimant suffers from compensable knee and back injuries, however the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the

claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

C. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

The parties stipulate Claimant was temporarily totally disabled between November 26, 1999 and January 28, 2000. (JX-1). On June 14, 2000, Dr. Moers stated Claimant had been temporarily totally disabled since December 14, 1999, and his condition would continue indefinitely. Dr. Bryan opined Claimant was unable to return to his former work on November 9, 2000, and in July 2001 he stated he had nothing more to offer Claimant. In August 2001 Dr. Gertzbein also concluded Claimant was unable to work at his usual job. Although Dr. Pennington released Claimant to work without restriction, I note he examined Claimant on one occasion. Therefore, I assign more probative value to the opinions of Claimant's treating physicians and find Claimant was temporarily totally disabled as of November 26, 1999 and continuing to the

date he reached MMI.

In his post-hearing brief, Claimant conceded he reached MMI with regard to his knee by November 12, 2001, despite the fact that none of his treating physicians had released him to work. Moreover, this is consistent with Dr. Bryan's opinion that he had nothing more to offer Claimant and Dr. Fulford's finding that Claimant had reached MMI with respect to his left knee on December 11, 2001. Thus, I find Claimant's left knee reached MMI as of November 12, 2001, and, due to his residual impairments, his disability reached permanency on that date.

A determination of whether Claimant suffers from total or partial disability must now be considered. Dr. Fulford released Claimant with no knee impairment or work restrictions. However, Dr. Bryan at no point released Claimant to work. Additionally, Dr. Gertzbein testified Claimant's knee would contribute to his physical restrictions and keep him from returning to his former job. Most importantly, Raymond Hernandez testified he witnessed Claimant's limp and the difficulty he had with stairs. He stated there are no jobs available through the Union which Claimant would be capable of performing given his physical condition. Accordingly, I find Claimant has been totally disabled with respect to his knee condition since November 12, 2001, when he reached MMI.

Claimant argues he has not reached MMI with respect to his back injury. Dr. Gertzbein testified he has not released Claimant to work, and Claimant will likely be unable to return to his former job. He opines Claimant will reach MMI somewhere between six and nine months after the back surgery, but will have limitations regarding lifting, bending, stooping and climbing. Dr. Fulford deferred to Dr. Gertzbein for all opinions concerning Claimant's back. Therefore, since Dr. Gertzbein testified Claimant has not reached MMI, and is unable to work at this time, I find Claimant is temporarily totally disabled with respect to his back.

Accordingly, in light of Claimant's total disability from his knee and his back conditions, along with his physical inability to perform his former job duties, I find Claimant has established a **prima facie** case of permanent total disability.

D. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New

Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., 930 F.2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane Co., 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991). In so concluding, the Board adopted the rationale expressed by the Second Circuit in Palumbo v. Director, OWCP, 937 F.2d 70, 76 (2d Cir. 1991), that MMI "has no direct relevance to the question of whether a disability is total or partial, as the nature and extent of a disability require separate analysis." The Court further stated that ". . . It is the worker's inability to earn wages and the absence of alternative work that renders him totally disabled, not merely the degree of physical impairment." Id.

In the present matter, Claimant contends his knee injury and his back injury, though not at MMI, caused him permanent impairment which will prevent him from being able to return to his former job as a longshoreman. His contention is buttressed by the testimony of Mr. Hernandez and Dr. Gertzbein who both opined Claimant will not be able to work as a longshoreman given his physical condition. Claimant further contends his age and illiteracy will disable him from securing any alternative employment.

It is Employer/Carrier's burden to establish suitable alternative employment, which they failed to do in this matter. They did not present evidence of any possible suitable alternative employment for Claimant, nor did they include the issue in their post-hearing brief. No vocational testing was performed on Claimant, and no labor market survey was conducted. Thus, Employer/Carrier failed to rebut Claimant's **prima facie** case of permanent total disability and I accordingly find he is entitled to such compensation from November 12, 2001 and continuing. The concurrent period of temporary disability for

Claimant's back injury does not change the character of the permanent disability resulting from Claimant's knee injury. If Claimant is permanently and totally disabled due to his knee injury standing alone, he should not be penalized because he also suffers from a temporary back injury. I so find and conclude.

E. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or

refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

In the present matter, Claimant requested Employer/Carrier's authorization to receive medical treatment on numerous occasions. His initial request to see a doctor for his injury in November 1999 was granted and Claimant saw Dr. Moers. Employer/Carrier denied his request to have an orthopedic consult with Dr. Eidman, and thereafter denied Dr. Sanders' and Dr. Butler's requests to perform surgery on Claimant's knee. Finally, Claimant was able to receive assistance from his personal insurance carrier, Connecticut General Life Insurance Company, which authorized him to see Dr. Bryan, as well as all subsequent doctors and surgeries.

Although Claimant requested authorization before seeking medical treatment, to be reimbursed for such treatment he must also establish it was reasonable and necessary. Three doctors, Dr. Sanders, Dr. Butler and Dr. Bryan all opined Claimant needed surgery to repair his knee injury. Dr. Pennington opined Claimant was not in need of surgery. However, Dr. Fulford reviewed Claimant's medical records and stated his knee surgery was preceded by seven months of "proper conservative care," and was a last resort for Claimant's recovery. In light of such medical records, I find Claimant's arthroscopic knee surgery to have been reasonable and necessary.

Dr. Gertzbein treated Claimant for his back injury in a conservative manner, first trying medications, physical therapy

and steroid injections to ease the pain. He did not perform surgery until six months after first examining Claimant. Dr. Fulford deferred to Dr. Gertzbein for any comment related to Claimant's back treatment. Thus, I find Claimant's back treatment and surgery by Dr. Gertzbein was reasonable and necessary for his recovery.

Claimant developed panic attacks after his back surgery, which Dr. Gertzbein diagnosed as "a postsurgical trauma type syndrome." He referred Claimant to Dr. Restrepo, but Claimant saw Dr. Hauser instead because he was on Claimant's insurance plan. The panic attacks are related to Claimant's back surgery and he was referred to a psychiatrist by his treating physician, Dr. Gertzbein, therefore Claimant's psychiatric treatment is reasonable and necessary. (See Armfield v. Shell Offshore, 25 BRBS 303, 309 (1992)(when a treating physician refers a claimant to a psychiatrist, she is providing the care of a specialist whose services are necessary for the treatment of the compensable injury)).

In the present matter, Employer/Carrier have been found liable for Claimant's November 26, 1999 work injury and its residuals. Accordingly, Employer/Carrier are responsible for all reasonable and necessary medical expenses related to Claimant's aggravated chondromalacia in the knee and degenerative disk disease conditions, including his arthroscopic knee surgery, spinal fusion and psychiatric treatment.

Claimant's Exhibit number 24 reflects medical billings he purportedly paid himself and mileage to treating facilities for which he should be reimbursed.

F. Intervenor's Request For Reimbursement

At the hearing, The Maritime Association, ILA Welfare Fund and its National Plan, which is administered by Cigna Insurance Company, sought intervention in this matter. Intervenor seeks reimbursement of medical costs expended on behalf of Claimant from the ILA Welfare Fund after Claimant was unable to obtain authorization for medical care and treatment from Employer/Carrier.

Section 17 of the Longshore Act provides in pertinent part that when a trust fund established pursuant to a collective bargaining agreement in effect between the employer and an employee covered under the Act has paid disability benefits to an employee which the employee is legally obligated to repay, the

Secretary shall authorize a lien on such compensation in favor of the trust fund for the amounts of such payments. See 33 U.S.C. § 917.

I find that the Welfare Fund has made timely application for intervention and its intervention is hereby granted.

At the hearing, it was argued that Claimant entered into an agreement to receive benefits from the intervenor and to correspondingly repay or reimburse such monies if and when Claimant received any proceeds from the successful outcome of his pending claim. (IX-1). Intervenor seeks such repayment from either the Employer/Carrier or Claimant. As of the hearing date, Intervenor estimated the medical expenses paid totaled $4,132.82 which had been disbursed during the period from October 11, 2000 through March 6, 2001. (Tr. 12-13).

During post-hearing development, Claimant submitted CX-25 which was received into evidence. CX-25 purports to be copies of medical expenses disbursed by Intervenor which totals $25,717.55 for treatment by various medical providers from Claimant's knee and back condition.[4] Intervenor seeks reimbursement of such medical expenditures from Employer/Carrier or Claimant.

Since I have found that Employer/Carrier denied Claimant authorization to seek treatment from his choice of physician, and having found that the medical treatment Claimant sought and received for his knee, back and psychiatric injuries were work-related and were reasonable and necessary, I further find and conclude that Employer/Carrier are responsible for the medical expenses incurred by Claimant therefor.

Intervenor has provided **prima facie** evidence of the Welfare Fund's entitlement to the relief it seeks in the form of reimbursement and neither Claimant nor Employer/Carrier have adduced any evidence contradicting the factual basis for the Intervenor's application.

Accordingly, Intervenor is entitled to a lien against Employer/Carrier and to be reimbursed any monies disbursed on behalf of Claimant's medical treatment relating to his knee, back and/or psychiatric injuries because of Employer/Carrier's refusal

---

[4] It is noted that billings which appear at pages 7, 13 and 21 of CX-25 are duplicative, page 31 is duplicative of page 33, and thus have been added only once.

to authorize medical treatment requested by Claimant. Therefore, Employer/Carrier are responsible to reimburse Intervenor the monies disbursed relating to costs and expenses of Claimant's medical treatment.

To the extent Claimant seeks reimbursement of any other monies disbursed by any other insurance provider on his behalf for medical treatment, his request is denied in the absence of a timely intervention by such providers. See Aetna Life Insurance Co. v. Harris, 578 F.2d 52, 53-54 (3rd Cir. 1978).

G. Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average **annual** earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average **weekly** wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. SGS Control Services v. Director, OWCP, supra, at 441; Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sum nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual **daily** wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings. Claimant has worked at the same job for 29 years, but his wage records for the year preceding his injury indicate he only worked an average of 2.5 days per week. (CX-10, p. 3). Because of this intermittent work schedule, Claimant's average weekly wage cannot be accurately computed based on the 5 or 6-day worker model in Sections 10(a) and 10(b).

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which he was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. § 910(c).

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P & M Crane Co., supra; Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. Barber v. Tri-State Terminals, Inc., supra. Section 10(c) is used where a claimant's employment, as here, is seasonal, part-time, intermittent or discontinuous. Empire United Stevedores v. Gatlin, supra, at 822.

I find that because Sections 10(a) and 10(b) of the Act cannot be applied, Section 10(c) is the appropriate standard under which to calculate average weekly wage in this matter.

The parties originally disputed Claimant's annual wages for the year preceding his work-related injury, specifically the time period from November 26, 1998 to November 26, 1999. Claimant contended his annual wage should include his wages, container royalties and vacation payments. Employer/Carrier contended only the earned wages should be used to compute Claimant's average weekly wage. However, at the hearing the parties were inclined to agree with Claimant's average weekly wage computations. Nevertheless, I will discuss this issue in detail.

Section 2(13) of the Act defines wages as

> . . . the money rate at which the service rendered by

> an employer or under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 [26 U.S.C.A. § 3101 et seq.] (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

33 U.S.C. § 902(13).

The advantage must be ascertainable and readily calculable. Morrison-Knudsen Constr. Co. v. Director, OWCP, 461 U.S. 624, 632, 15 BRBS 155, 157 (CRT) (1983); McMennamy v. Young & Co., 21 BRBS 351, 353 (1988); Denton v. Northrop Corp., 21 BRBS 37, 47 (1988); Thompson v. McDonnell Douglas Corp., 17 BRBS 6, 8 (1984). This determination is based on whether the benefits are fluid and have "a present value that can be readily converted into a cash equivalent on the basis of their market value." Morrison-Knudsen, 461 U.S. at 632.

Container royalty payments are compensation paid by shipping companies in lieu of work lost by longshoremen due to containerization. Because they are readily determinable, they are considered part of an employee's "wages." Lopez v. Southern Stevedores, 23 BRBS 295 (1990); Parks v. John T. Clark & Son of Maryland, Inc., 9 BRBS 462, 462 (1979). Similarly, vacation pay has been considered part of an employee's wages because it too is easily calculated. Sproull v. Stevedoring Servs. of America, supra, at 106 (1991); Duncan v. Washington Metro Area Transit Auth., 24 BRBS 133, 136 (1990); Rayner v. Maritime Terminals, 22 BRBS 5, 9 (1988); Waters v. Farmers Export Co., 14 BRBS 102, 106 (1981), aff'd per curiam, 710 F.2d 836 (5th Cir. 1983); Parks, 9 BRBS at 462.

In Parks, the Board included vacation pay and container royalties received by employee at the end of the contract year, but after the date of the injury, as part of employee's average weekly wage because they were earned over the course of the contract year in which the injury occurred. Parks, 9 BRBS at 465. In Sproull, however, the Board held vacation pay is calculated the year it is received rather than the year it is earned. 25 BRBS at 106. The claimant in Sproull received his

1984 vacation pay in April 1985, in accordance with the wage rates for 1985, thus it was excluded from his 1984 average weekly wage. The Board distinguished this from the situation in Parks, where the vacation pay was distributed at the end of the contract year at that year's wage rates, and was included in the claimant's average weekly wage for that same year. See Sproull, 25 BRBS at 106.

In the present case, Claimant's vacation pay for 1999 was distributed to him in December 1999. Although this was after the date of injury, I note it was within close temporal proximity thereto. More importantly, the vacation pay was distributed at the end of the year it was earned and at that year's wage rates. Therefore, I find Parks to be controlling law in this case, and Sproull factually distinguishable. I conclude Claimant's vacation pay distributed to him in December 1999 shall be included in his average weekly wage calculation for the time period between November 1998 and November 1999.

Claimant also submitted evidence of container royalty payments distributed in December 1998 and December 1999. I find the royalty payment received in 1999, not the 1998 payment, shall be included in Claimant's average weekly wage for the same reasoning as the 1999 vacation pay, because the 1999 payment more reasonably reflects Claimant's earning capacity at the time of his injury.

Claimant asserts an average weekly wage of $501.96, calculated by adding his annual wage from the year immediately preceding the date of his injury, his 1999 vacation pay and 1998 container royalties ($23,232.33 + $2,480.40 + $388.87 ÷ 52 = $501.96 per week). Employer/Carrier did not propose any method of calculating Claimant's average weekly wage, though at the hearing they were inclined to agree with Claimant's computations of average weekly wage.

However, following the Parks decision, I find Claimant erred in using his 1998 container royalty payment rather than his 1999 container royalty payment to calculate his average weekly wage. Thus, I conclude his average weekly wage to be $507.78 ($23,232.33 in wages + $2,783.20 in container royalty payments + $388.87 in vacation pay = $26,404.40 ÷ 52 weeks = $507.78 per week). (See CX-10 pp. 3-4; CX-10(a) p. 2).

H. Cost of Living Increases

Section 10(f), as amended in 1972, provides that in all post-amendment injuries where the injury resulted in permanent

total disability or death, the compensation shall be adjusted annually to reflect the rise in the national average weekly wage. 33 U.S.C. § 910(f); Trice v. Virginia Int'l. Terminals, Inc., 30 BRBS 165, 168 (1996). Accordingly, upon reaching a state of permanent and total disability on November 12, 2001, Claimant is entitled to annual cost of living increases, which rate is adjusted commencing October 1 of every year, and shall commence October 1, 2002. This increase shall be the lesser of the percentage that the national average weekly wage has increased from the preceding year or five percent, and shall be computed by the District Director.

V. SECTION 14(e) PENALTIES

Section 14(b) of the Act provides that compensation shall be paid in semimonthly installments, the first of which becomes due on the fourteenth day after the employer was notified of the injury or death.

Under Section 14(e), an employer may face an additional assessment if it does not pay compensation within 14 days after it becomes due. Thus, an employer essentially has 28 days after it is notified of the injury or death to pay compensation; a 10% penalty is assessed if the employer fails to pay within 14 days after compensation is due, and compensation is due 14 days after employer is notified. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n.3 (1981).

Such penalty attaches retroactively to the date the employer knew of the injury or death, and tolls when the employer's liability terminates. "[O]nce an employer receives notice, it must either file a notice of controversion within 14 days or commence payments on the 28th day after receipt of notice; otherwise, the penalty attaches to all payments 'due and unpaid.'" Pullin v. Ingalls Shipbuilding, 27 BRBS 45, 46 (1993). The assessment applies to "payments not made from the time the employer learned of the injury until the time it finally filed a notice." Nat'l. Steel & Shipbuilding Co. v. Bonner, 600 F.2d 1288, 1294 (9th Cir. 1979)(citing Oho v. Castle and Cooke Terminals, Ltd., 9 BRBS 989 (1979)); see also McKee v. D.E. Foster Co., 14 BRBS 513, 519 (1982)(all payments which become due between the date the employer knew of injury and the date it filed a notice of controversion are subject to Section 14(e) penalties). Additionally, where the employer voluntarily pays compensation benefits at a rate lower than that which is ultimately awarded the claimant, Section 14(e) liability is based solely on the difference. McKee, supra, at 519.

In the present matter, Employer stipulates it first knew of Claimant's injury on November 26, 1999. (JX-1). Employer did not file a notice of controversion until 31 days later, on December 27, 1999. (CX-2, p. 2). Employer paid Claimant compensation benefits from November 27, 1999, until it voluntarily suspended such payments on January 28, 2000.[5] (CX-3, p. 1). However, Employer did not pay the first payment of compensation until January 7, 2000, 41 days after first learning of Claimant's injury. (CX-5, p. 3). This first installment became due on December 10, 1999, the fourteenth day after Employer had knowledge of Claimant's injury.

Employer did not timely file a notice of controversion nor timely compensate Claimant. Thus, I find Claimant is entitled to a 10% penalty on all compensation due and unpaid between November 26, 1999 and December 27, 1999. Furthermore, as Claimant's average weekly wage, and thus compensation rate, has been determined to be greater than that upon which Employer calculated its voluntary compensation payments, the penalty applies only to the difference in compensation paid which was terminated on January 28, 2000.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by

---

[5] Employer suspended compensation payments based on Dr. Pennington's January 26, 2000 report that Claimant had reached MMI and was able to return to his regular work duties without restriction. (CX-16, p. 2).

reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees.[6] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for **temporary total disability** from **November 26, 1999** to **November 11, 2001,** based on Claimant's average weekly wage of $507.78, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for **permanent total disability** from **November 12, 2001 through the**

---

[6] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **December 13, 2000,** the date this matter was referred from the District Director.

present and continuing thereafter based on Claimant's average weekly wage of $507.78, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Commencing October 1, 2002, Employer/Carrier shall pay annual cost of living increases to Claimant in accordance with 33 U.S.C. § 910(f). The specific dollar amounts shall be computed by the District Director.

4. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's November 26, 1999 work injury to his knee and the resulting residuals therefrom to include his back and psychiatric conditions, pursuant to the provisions of Section 7 of the Act.

5. Employer/Carrier shall reimburse, consistent with this Decision, the Maritime Association-ILA Welfare Fund for monies disbursed on behalf of Claimant to medical providers for treatment received after Employer/Carrier denied Claimant authorization for medical care.

6. Employer/Carrier shall be liable for an assessment under Section 14(e) of the Act to the extent that the installments found to be due and owing prior to January 28, 2000, as provided herein, exceed the sums which were actually paid to Claimant.

7. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid.

8. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

9. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 11th day of July, 2002, at Metairie, Louisiana.

A

LEE J. ROMERO, JR.
Administrative Law Judge